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Nos. 14-556, 14-562, 14-571 and 14-574

IN THE
Supreme Court of the United States

JAMES OBERGEFELL, et al.,
Petitioner,
v.
RICHARD HODGES, Director,
Ohio Department of Health, et al.,
Respondents.

[See Next Page For Other Consolidated Cases]

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF SOUTH CAROLINA IN SUPPORT OF RESPONDENTS

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VALERIA TANCO, et al.,

Petitioners,

v.

BILL HASLAM, Governor of Tennessee, et al.,

Respondents,

APRIL DEBOER, et al.,

Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,

Respondents.

GREGORY BOURKE, et al.,

Petitioners,

v.

STEVE BESHEAR, Governor of Kentucky, et al.

Respondents.

QUESTION PRESENTED

The amici will address the first question presented by these cases:

Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

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STATEMENT OF INTEREST

South Carolina possesses a strong interest in affirmance. Art. XVII, § 15 of the South Carolina Constitution provides that "[a] marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State." This constitutional definition codified longstanding South Carolina law. *See McCreery v. Davis*, 44 S.C. 195, 22 S.E. 178, 182 (1895).

The historic evidence concerning the treatment of women, presented as the views of the Fourteenth Amendment's framers are not those of the State today. Seemingly anachronistic, such evidence is, nevertheless, reflective of the Amendment's original meaning which we believe controls this case.

SUMMARY OF ARGUMENT

This Court has recognized that, in interpreting the Constitution, it must "look first to evidence of [its] original understanding." *Alden v. Maine*, 527 U.S. 706, 741 (1999). To those who drafted and ratified the Fourteenth Amendment, and to those who publicly stated its meaning and purpose at that time, it was unimaginable marriage was not the exclusive province of the states to define. Nor did the framers and their contemporaries conceive that the definition of marriage consisted of anything other than the union between man and woman. Indeed, the framers insisted upon leaving untouched those state laws depriving women of basic rights upon marriage to a man. Surely then, those state laws exclusively defining marriage as between a man and woman were hands off under the Amendment's original meaning.

While undoubtedly there are applications of the Fourteenth Amendment unforeseen by its drafters, same-sex marriage is not one. No evidence exists that the Amendment imposed a different meaning upon states than their longstanding marriage definition. This is not a case where judicial construction relies upon an evolving concept of the Amendment beyond its historical foundation to create a new constitutional right. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992). To the contrary, the Joint Committee on Reconstruction's adoption of the Amendment, ". . . undercuts [that] . . . the framers intended to constitutionalize . . . more general rights of fairness, content of which

would change over time as mores and conditions change." Maltz, *The Fourteenth Amendment As Political Compromise,* 45 Ohio St. L. J. 933, 969 (1984).

In fact, contemporaneously with the Amendment's ratification, and reflective of its original meaning, same-sex marriage was categorically rejected. Such was perceived as not procreating children nor promoting families. Family life was of paramount importance to the Fourteenth Amendment framers, particularly because slave families had been so disrupted by their masters. Where there is a "longstanding and still extant societal tradition withholding the very right" being sought, the Fourteenth Amendment will not supply that right. *See Michael H. v. Gerald D.,* 491 U.S. 110, 127, n. 6 (1989) (opinion of Scalia, J.). As a result, a construction "contrary to the intentions of the Framers of the Fourteenth Amendment" must be rejected. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490-91 (1989).

After the Amendment's adoption, the traditional marriage definition was considered untouched. This Court endorsed the traditional definition in *Murphy v. Ramsey,* 114 U.S. 15, 45 (1885). Legal treatises agreed. And, almost one hundred years later in *Baker v. Nelson,* 409 U.S. 810 (1972), the Court rejected same-sex marriage as mandated by the Fourteenth Amendment. The Amendment's text has not changed. Nor should its interpretation.

The Fourteenth Amendment certainly proscribes laws banning interracial marriage – a product of the

Jim Crow era – and part of the State-sponsored racial discrimination the Amendment sought to extinguish. *See Loving v. Virginia*, 388 U.S. 1 (1967). However, apart from those blatantly racial enactments, the institution of marriage ". . . has long been regarded as a virtually exclusive province of the states." *Sosna v. Iowa*, 419 U.S. 393, 404 (1979). *Sosna* noted that "cases decided . . . [for] more than a century bear witness" that domestic relations is a state, not a federal domain. *Id.* This Court's deference to the states regarding marriage reflects the genius of the framers of the Amendment, who insisted that state marriage laws remain intact to protect families. But the framers were also clear that each state could design marriage laws as it saw fit. Such deference preserves dual sovereignty, and upholds the Tenth Amendment.

Thus, whether to employ the traditional marriage definition, universally used in 1787 and 1868, or to expand "marriage" to same-sex couples, remains for the State and its people. The Fourteenth Amendment does not interfere. As Justice Holmes declared, "[t]he Fourteenth Amendment, itself a historical product, did not destroy history for the State and substitute mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). Drafters of the Amendment sought to remove badges of slavery. Therefore, the provision ". . . was regarded by its framers and ratifiers as declaratory of the previously existing law and Constitution." Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3, 5 (1954). Put simply, the Amendment, coexisting with the Tenth Amend-

ment, was not intended to withdraw the State's power to define marriage as its citizens desire. To the contrary.

Preservation of federalism is particularly crucial for marriage, "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Moreover, "[t]he marriage relation creates problems of large social importance." *Id.* at 298. Thus, the State possesses a "large interest" in regulating the institution. *Id.* Only recently, in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), the Court reaffirmed State sovereignty in defining marriage – a power traced to the Founding – and one "'reserved to the States. . . .'" *Id.* at 2680 (*quoting Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)). In *Windsor*, federalism insulated New York's marriage definition from federal interference.

As in *Windsor*, the four states involved here, as well as many others, including South Carolina, have a constitutionally protected power to define marriage, the essence of federalism. *Windsor* emphasized that "[m]arriage laws vary in some respects from State to State." *Id.* at 2681. Thus, federalism allows fifty different definitions of marriage in fifty different states. Accordingly, equal respect for the marriage laws of Ohio, Tennessee, Kentucky and Michigan should be given, as *Windsor* gave New York's. Such deference, in the form of federalism, "secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby County v.*

Holder, 133 S.Ct. 2612, 2623 (2014) (internal quotations omitted).

Neither in 1868, nor now, does the Fourteenth Amendment compel a "one size fits all" for state marriage laws. Now, as then, the Tenth Amendment and federalism are foundational rocks upon which our Constitution rests. This foundation should not be rent asunder. If so, dual sovereignty is dead.

Loving is irrelevant. That case, and other marriage decisions, such as *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Turner v. Safley*, 482 U.S. 78 (1987) involved traditional marriage. Using race to define marriage, as in *Loving*, crosses the Fourteenth Amendment line. But using the traditional definition of marriage, accepted everywhere at the time of the Amendment's adoption in 1868, as well as when *Loving* was decided in 1967, does not. The common law prohibited same-sex marriage, but permitted interracial marriages between man and woman. Such racial prohibitions were the product of statute in the "era of Jim Crow racism." James, *Shades of Brown: The Law of Skin Color*, 49 Duke L. J. 1487, 1511 (2000).

Scholars document that the Fourteenth Amendment framers intended to prohibit laws banning interracial marriage. *Id.* Indeed, contemporaneously with the Fourteenth Amendment's adoption, in *Burns v. State*, 48 Ala. 195, 197 (1872), the Alabama Supreme Court so concluded. Thus, Petitioners' reliance upon *dicta* in *Loving* – a racial discrimination case – to support same-sex marriage, foreign to all when the Fourteenth Amendment was ratified, is

ill-founded and counter-historical. In characterizing marriage as "fundamental," *Loving* did not open the constitutional door requiring that States define marriage in non-traditional ways.

Furthermore, the traditional family, with the husband as unquestioned head, was the foundation of the Fourteenth Amendment framers' world. The framers deeply believed the family was the "primary unit of social and political action at the time. . . ." Farnsworth, *Women Under Reconstruction: The Congressional Understanding,* 94 Nw. U. L. Rev. 1229, 1236 (2000). One senator feared giving women the vote would disturb "'. . . the family circle, which is even of higher obligation than the obligation of Government.'" *Id.*, (*quoting Cong. Globe,* 42nd Cong., 2d Sess. 845 (1872)). Thus, Section Two of the Amendment eliminated women from the franchise.

Having this mindset, the Amendment's framers certainly did not intend to dismantle, but fought to preserve, state marriage laws. Indeed, skeptical congressmen insisted that these remain unaffected by the Amendment. Many feared that state disabilities placed upon married women, such as property ownership, would be undermined by an earlier Amendment draft. However, such concerns were allayed in the Amendment's final wording. Thus, the Amendment was subsequently passed and ratified, allowing states ultimately to abolish these disabilities themselves. While no one could reasonably argue that those disabilities are constitutional under this Court's more recent decisions, the framers' insistence upon maintaining them vividly illustrates

their intent to ensure that state marriage laws are virtually the exclusive province of the states. In light of the then overriding importance of traditional marriage as the family foundation, "[t]he idea that . . . the framers and ratifiers of the Fourteenth Amendment thought they were enshrining same-sex marriage into the Constitution is utterly implausible. . ." Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L. J. 513, 550 (2015). Indeed, at that time, authorities concluded that same-sex marriage had no validity.

State authority to define marriage should not now be destroyed by a ruling without basis in history or constitutional law. Reliance upon *Loving*, or gender discrimination cases, or a disregard of longstanding deference to the States in their domestic relations,[1] is unwarranted given the Fourteenth Amendment's history.

Certainly, this Court's Fourteenth Amendment decisions go well beyond the Amendment's overriding original purpose of banning racial discrimination. Nevertheless, not one decision of this Court undercuts the State's power to define marriage as

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[1] Federal question jurisdiction is lacking for domestic relations. *See Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006); *Wilkins v. Rogers*, 581 F.2d 399 (4th Cir. 1978); *Barber v. Barber*, 62 U.S. 582, 602 (1858) (opinion of Daniel, J.). Scholars agree. *See* Harbach, *Is The Family A Federal Question?*, 660 Wash. & Lee L. Rev. 131, 146 and cases collected at n. 59 (2009); Calabresi, *The Gay Marriage Cases and Federal Jurisdiction* (October 2, 2014), Nw. L. & Econ. Research Paper No. 14-18 (Available at http://dx.doi.org/10.2139/SSM.2505515).

traditionally defined, and as was universally defined in 1868. Cases such as *Romer v. Evans*, 517 U.S. 620 (1996), invalidating discrimination against homosexuals, provide no basis to alter a State's longstanding definition of marriage, one long accepted by this Court. As Justice O'Connor wrote in *Lawrence v. Texas*, 539 U.S. 558, 585 (2003), (O'Connor, J., concurring), "preserving the traditional institution of marriage" is a "legitimate State interest ," one unrelated to "mere moral disapproval of an excluded group."

Reversal here obliterates a right reserved to the states by the Tenth Amendment. Each State should continue to define marriage as appropriate, as it has since "the Nation's beginning." *Windsor*, 133 S.Ct. at 2691.

ARGUMENT

I. The History Of The Fourteenth Amendment Shows Its' Framers Did Not Intend to Displace The States' Tenth Amendment Power to Define and Regulate Marriage.

A. *State Sovereignty Over Marriage.*

As observed in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1939) the Constitution "recognizes and preserves the independence of the States. . . ." (internal quotations omitted); *see also*, *U.S. v. Morrison*, 529 U.S. 598, 620 (2000) [noting the framers of the Fourteenth Amendment had a "carefully crafted balance" between the States and Federal Govern-

ment]. Indeed, Justice Black observed that "the Fourteenth Amendment was . . . not intended to strip the States of their power . . . to govern themselves." *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970).

The State's supremacy over marriage is a staple of federalism. Long ago, it was observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890). The Court has not wavered since. *See Trammel v. U.S.*, 445 U.S. 40, 49 (1980) [stating marriage is "traditionally reserved to the States."]; *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) [concluding federal courts may abstain as to issues of domestic relations]. Indeed, so strong is the State's power over domestic relations, this Court refused to decide an Establishment Clause claim, in deference thereto. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004).

Justice Black recognized "[t]he institution of marriage is of peculiar importance to the people of the States." *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971) (Black, J., dissenting). States are where people "live and vote and rear their children under laws passed by their elected representatives." *Id.* They "have particular interests in the kinds of laws regulating their citizens when they enter into, maintain and dissolve marriages." *Id.*

The Court's longstanding deference reflects the framers' original intent to preserve the family by leaving marriage entirely to the states. Elsewhere,

Justice Black stressed that family matters are reserved under the Tenth Amendment, noting that "the power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution . . . to the legislature of that State." *Labine v. Vincent*, 401 U.S. 532, 538 (1971). He added that "[a]bsent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from possible laws." *Id.* at 538-39; *see also, United States v. Lopez*, 514 U.S. 549, 564 (1995) [stating the Commerce Clause does not authorize the United States to regulate family law, including marriage]. The framers of the Fourteenth Amendment saw it that way too. As *Windsor* recently summarized, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate states." 133 S.Ct. at 2689-90.

B. *The Importance of History in Interpreting The Fourteenth Amendment.*

Furthermore, "[t]he historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten." *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948). The Amendment sought to abolish discrimination "based on considerations of race or color" and the "provisions of the Amendment are to be construed with this fundamental purpose in mind." *Id.* While Court members disagree about the use of history to define Fourteenth Amendment rights, there should be no disagreement here. As was said in *Blake v. McClung*,

172 U.S. 239, 261 (1898), "[u]nder any other interpretation, the fourteenth amendment would be given a scope not contemplated by its framers, or by the people, nor justified by its language."

Accordingly, the Court often examines evidence at the time of the Fourteenth Amendment's adoption. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010) [". . . the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection."]. Indeed, recently, in *Town of Greece v. Galloway,* 134 S.Ct. 1811, 1819 (2014), the Court chronicled historical usage to determine prayer practices. In *McDonald,* it was agreed that the intention of the "Framers and ratifiers of the Fourteenth Amendment counted" in determining "those fundamental rights necessary to our system of ordered liberty." 561 U.S. at 778. But same-sex marriage was foreign to the framers' definition of marriage. At the time of the Amendment, leading treatise writers on domestic relations rejected it outright as having "no validity." Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce,* Vol. 1, § 321 (Boston, Little, Brown and Co., (5th ed. 1873).

C. *The Debates Concerning the Adoption of The Fourteenth Amendment Demonstrate the Framers' Continued to Reserve Questions of Marriage to The States.*

The Court has also emphasized the Amendment's legislative debates reveal a primary purpose "to incorporate the guaranties of the Civil Rights Act of

1866 in the organic law of the land." *Hurd v. Hodge*, 334 U.S. 24, 32 (1948). Justice O'Connor explained, ". . . the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks." *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). When the framers said the Amendment abolished the subjecting of "one caste" to "a different code" they clearly meant racial discrimination and nothing else. *Cong. Globe*, 39th Cong. 1st Sess. 2766 (1866) [comparing different treatment of "black man" and "white man."].

Scholars agree. *E.g.* O'Neill, *Raoul Berger and The Restoration of Originalism*, 96 Nw. U. L. Rev. 253, 264 (2001) [". . . many Republican members of Congress doubted that the Thirteenth Amendment in fact supplied adequate constitutional authority for the [Civil Rights] Act, so the Fourteenth Amendment was thought necessary to provide the requisite authority for accomplishing its goals."]. Thus, "[i]t seems relatively clear from the history of the Fourteenth Amendment that it was intended to validate the Civil Rights Act of 1866 . . . which in turn aimed at invalidating the Black Codes of the Reconstructionist South." Moore, *Morality In Eighth Amendment Jurisprudence*, 31 Harv. J. L. & Pub. Pol'y, 47, 51 (2008). The Amendment's history, therefore, confirms its overarching purpose was aimed at eliminating racial discrimination. While the Amendment has been interpreted as applying to all, displacement of state marriage laws was the last thing the framers intended.

Importantly, "[e]ven the most radical of Republicans conceded that the principles underlying the Tenth Amendment continued to operate in the aftermath of the Thirteenth and Fourteenth Amendments." Lash, *Beyond Incorporation*, 18 J. Contemp. Legal Issues, 447, 460 (2009). Representative John Bingham, author of Section One of the Amendment, assured skeptics that the provision did not undermine the States' reserved powers. As Bingham explained, "[t]his amendment takes from no State any right that ever pertained to it." *Cong. Globe*, 39th Cong., 1st Sess., at 2542. Bingham earlier quoted Chancellor James Kent, stating the "'principal rights and duties which follow from our civil and domestic relations fall within the control'" of the State. *Id.* at 1292-93. The Congressman emphasized the "dual system of Government" maintained "our own nationality and liberty. . . ." *Id.* at 1293. He deemed the "protection of all the rights of person and citizen" are "the powers reserved to the States." *Id.*

Preservation of family was paramount to the Amendment's framers. The family was "a form of government . . .," and was a concern "repeatedly expressed" by Congress. Siegel, *She the People*, 115 Harv. L. Rev. 947, 983 (2002). Recognition of this importance is why the Court has refrained from injecting itself into domestic matters. As Justice Stewart stated in *Zablocki*, the right to marry "is under our federal system peculiarly one to be defined and limited by state law. . . . A State may not only 'significantly interfere with decisions to enter into a marital relationship,' but may in many cir-

cumstances absolutely prohibit it." 434 U.S. at 392 (Stewart, J., concurring). Senator Edgar Cowan asked during the Reconstruction debates whether the states are "sovereign to determine . . . the question of polygamy, the question of incest, or any other question which . . . would materially affect the interests of the community constituting the State?" *Cong. Globe*, 39th Cong., 1st Sess., at 604. He answered his own question: "the relations of the citizens or inhabitants of the several States are peculiarly within the legislation of those States." *Id.*

The centerpiece of family unity was, to the Amendment's framers, those state laws placing disabilities upon a married woman, preventing her from owning property, contracting, or bringing suit. *See* Schouler, *A Treatise on the Law of Domestic Relations* at 17 (Boston, Little, Brown and Co., 2d ed. 1874) [lessening disabilities "will weaken the ties of marriage by forcing both sexes into an unnatural antagonism. . . ."]. Scholars have chronicled:

> families sometimes were thought to be the core units protected by the Amendment, and we see this idea applied to property rights, not just political rights. Until [a woman] joined a family as wife and mother, a femme sole was a family of one and could hold property; but once she married, her property rights yielded to the order of the family circle.

Farnsworth, *supra* at 1241; *see also*, Balkin, *Plessy, Brown and Grutter: A Play in Three Acts*, 26 Cardozo L. Rev. 1689, 1696 (2005) [to the framers,

"some citizens" (married women) did not enjoy full civil rights, having "willingly surrendered" their rights to their husbands under coverture]. Thus, ". . . congressmen on all sides of the debates over the Fourteenth Amendment hoped that the . . . [Amendment] would not be read to disrupt common law coverture. . . ." Hasday, *Women's Exclusion From The Constitutional Canon*, 2013 U. Ill. L. Rev. 1715, 1719 (2013). Accordingly, Bingham and others sought to ease fears that the original Amendment draft might have upon these state laws.

Critics of this earlier version believed it could jeopardize these state enactments as well as many other laws[2] deemed to be State prerogatives. Senator William Stewart complained the proposed Amendment could cover virtually every state law. He emphasized the laws of the "several States . . . are very dissimilar in many respects, and some may afford greater protection to life, liberty and property than others. . . ." *Cong. Globe,* 39th Cong., 1st Sess. at 1082. Thus, "there would not be much left for the state legislatures." *Id.* Such a construction "can hardly have been intended by its framers." *Id.*

The colloquy between Representative Robert Hale and Bingham regarding the earlier Amend-

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[2] The Joint Committee's original draft, *see* n. 3, below, invoked, "hostile criticism of it by members of his own party." Flack, *The Adoption of the Fourteenth Amendment*, 59 (Johns Hopkins Press 1908). This opposition is discussed thoroughly in *Boerne v. Flores*, 521 U.S. 507, 520-24 (1997).

ment draft is instructive.[3] To Hale, the Amendment "proposes an entire departure from the theory of the Federal government meddling with these matters of State jurisdiction at all." *Id.* at 1063. His concern was state marriage laws, specifically coverture laws. *Id.* Hale inquired whether "anyone even assumed[d] that Congress was to be invested with the power to legislate on that subject, and to say that married women in regard to their right of property, should stand on the same footing as men and unmarried women?" *Id.* He noted virtually every state imposed such burdens upon married women and feared the proposal could empower Congress to displace these disabilities. *Id.* To Hale, the proposed Amendment "takes away from . . . States the right to determine what their institutions shall be." *Id.* at 1065. Hale, recognizing the "liberal construction" being given the present Constitution, challenged Bingham to "state where he apprehends that Congress and the courts will stop in the powers they may arrogate to themselves under this proposed amendment." *Id.*

Making a federalism argument, Hale contended "[any] reforms of . . . [these laws] should come from

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[3] Representative Hale of New York was particularly outspoken regarding Bingham's original draft, arguing it gave Congress broad power to override, "all State legislation, in its codes of civil and criminal jurisprudence and procedure." *Cong. Globe*, 39th Cong., 1st Sess. at 1063. Hale's objections were to a draft empowering Congress to make laws "necessary and proper" to secure to all citizens "privileges and immunities of the citizens in the several states" and "all persons" equal protection in the rights of "life, liberty and property." *Id.*

the States, and not be forced upon them by the centralized power of the Federal Government." *Id.* at 1064. Seeking delay for "dispassionate reflection," Hale sought to "strengthen the liberties of the states and the rights of the states as well as the liberties of the citizens." *Id.*

Bingham tried to ease Hale's fears. Hale "need not be alarmed at the condition of married women." *Id.* at 1089. While women might possess certain rights "by the gift of God," their rights to property ownership, he said, are "dependent exclusively upon the local law of the States. . . ." *Id.* The Amendment, Bingham argued, did not alter State property laws, but addressed the situation where a person acquires property "not contrary to the laws of the State, but in accordance with its law," yet does not receive equal protection "in the enjoyment" of those laws. *Id; see also, id.* at 1064 (Representative Thaddeus Stevens) [". . . where all in the same class are dealt with in the same way then there is no pretense of inequality."]. State marriage laws defined that classification.

These reassurances demonstrate the framers intended no displacement of state marriage laws. Instead, dual sovereignty, protected by the Tenth Amendment, preserved those laws, and left to individual states their modification. As Congressman Shellabarger put it, "[y]our State may deprive women of the right to sue or contract or testify," but discrimination based upon race was forbidden. *Cong. Globe*, 39th Cong. 1st Sess. 1293 (1866).

This Court's Fourteenth Amendment decisions are not always in keeping with the Amendment's original meaning. Still, evidence is overwhelming that the framers were determined not to undermine state marriage laws, considered a reserved power. According to Representative Hale, states themselves could reform those laws.

The subsequent alteration of the Amendment's Section One provided additional comfort to concerns about intrusion upon state authority. As one scholar concluded:

> . . . the conservative Republicans who had condemned Bingham's federal power amendment in February had no difficulty with the version of section one that emerged from the Joint Committee in April. . . . [This] provides strong evidence that they did not view the current language of section one as being susceptible to the kind of open-ended interpretation . . . [feared earlier].

Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 Hastings Const. L.Q. 287, 320-21 (2015). Another authority states, "[t]he resulting amended texts advanced the cause of liberty in the States, but did so without unduly interfering with those rights and powers which a critical number of members believed ought to remain retained by the people in the states." Lash, *The Origins of the Privileges or Immunities Clause, Part II*, 99 Geo. L. J. 329, 431 (2011). Still another declares, "[t]he [Fourteenth] Amendment was understood not to disturb

the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women." Farnsworth, *supra* at 1230; *see also*, Gans, *The Unitary Fourteenth Amendment*, 56 Emory L. J. 907, 915 (2007) ["the Amendment's framers did not intend Section 1 to nullify the plethora of existing state laws that sharply limited the rights and freedoms of married women."]. Thus, the framers were intent upon preserving those state laws imposing disabilities on married women, believed to protect the traditional family unit. Marriage laws were within the states' province. It is incomprehensible the framers sought to alter the traditional definition of marriage, between man and woman, the family cornerstone.

D. *Post-Ratification Interpretation of The Fourteenth Amendment Confirms that The Amendment Did Not Displace The States' Authority to Define and Regulate Marriage.*

Following ratification, contemporaneous public interpretations reinforced the view that the Amendment did not undermine the State's marriage authority or the traditional marriage definition. In 1868, the year of ratification, a leading treatise summarized the State's power concerning marriage, stating, "[t]he legislature has the same full control over the *status* of husband and wife which it possesses over the other domestic relations, and may permit or prohibit it according to its own views of what is for the interest of the parties or the good of the public." Cooley, *A Treatise on The Constitutional*

Limitations . . . 111 (1st ed. Boston, Little, Brown and Co.,1868) (emphasis in original). Significantly, Cooley's analysis continued in subsequent *Treatise* editions, well after the Amendment's ratification, *Id.*, 132 (5th ed. Boston, Little, Brown and Co., 1883). This continuation confirms that the Fourteenth Amendment did not alter the State's power over marriage. As James Schouler wrote in 1874, "each State adopts its own system concerning marriage and divorce." Schouler, *supra* at 47. Cooley stated in his 1871 *Treatise*, "[t]his amendment of the Constitution does not concentrate power in the general government for any purpose of police governance within the States. . . ." Cooley, *A Treatise on the Constitutional Limitations*, 294 (2nd ed. Boston, Little, Brown and Co., 1871).

Moreover, the Court's first Fourteenth Amendment interpretation recognized that an effect which "radically changes" the relationship between federal and state governments was not "intended by the Congress which proposed these amendments nor by the legislatures of the States which ratified them." *Slaughterhouse Cases*, 83 U.S. 36, 78 (1872). Only a decade after 1868, and echoing Cooley, *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), explained that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created. . . ." (emphasis added). In *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), several decades after the Fourteenth Amendment's adoption, the Court observed "the Constitution of the United States does not interfere with the authority of the States over marriage. . . ." (emphasis

added). *Haddock's* statement is completely consistent with the framers' intent.

Shortly after the Amendment's ratification, *Bradwell v. Illinois*, 83 U.S. 130 (1872), was decided and is illustrative of the framers' purpose regarding the status of married women. Denial by Illinois of Mrs. Bradwell's application to practice law was held not to violate the Fourteenth Amendment. The concurrence of Justice Bradley explained that a principal reason for the decision of the Illinois Supreme Court was that "a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him." *Id.* at 141. Therefore, Mrs. Bradwell could not "fully . . . perform the duties and trusts that belong to the office of an attorney and counsellor." *Id.* She possessed no fundamental right to practice law under the Fourteenth Amendment and thus "it is within the province of the [Illinois] legislature" to decide the matter. *Id. Bradwell*, rendered immediately after the Amendment's adoption, confirms it did not alter state marriage laws or the framers' determination to protect state coverture practices. While *Bradwell* has been subsequently repudiated, still, except for race, the framers of the Fourteenth Amendment sought to exempt state marriage laws from the Amendment's impact.

E. *Post-Ratification Construction of The Fourteenth Amendment as it Relates to The Definition of Marriage Shows no Intent to Disturb Traditional Marriage.*

Importantly also, at the time of the Amendment, traditional marriage between one man and one woman was universally recognized as the only accepted form of marriage. Same-sex marriage was completely forbidden. After the Amendment's ratification, a leading authority opined that, "[m]arriage between two persons of one sex could have no validity, because such a connection would not perpetuate population or produce the comforts and solace proceeding from the family relationship." Bishop, *Commentaries on the Law of Marriage and Divorce,* Vol. 1 at § 321.

Other authorities at the time are instructive also. James Schouler described the "essentials of marriage" as including "two persons of the opposite sexes. . . ." Schouler, *A Treatise on the Law of Domestic Relations* at 26. In 1873, Bishop defined marriage as "the civil status of one man and one woman united in law for life . . . whose association is founded on the distinction of sex." Bishop, *Commentaries on the Law of marriage and Divorce,* Vol. 1 at § 3. He further commented that marriage "is the law of nature ... [which] flowed into the municipal laws of every civilized country and into the general law of nations." *Id.* According to another treatise, ". . . there are in effect, three parties to every marriage – the man, the woman, and the State." Joseph R. Long, *A*

Treatise on The Law of Domestic Relations, § 5 (St. Paul, Keefe-Davidson Co. 1905).

Significantly, the marriage definition in every state was precisely the same before and after the Amendment's adoption, indicating the Amendment had no effect upon this definition. In *Askew v. Dupree*, 30 Ga. 173 (1860), Justice Henry Lumpkin quoted Bishop, explaining marriage is "'a civil status, existing in one man and one woman, legally united for life. . . ." 30 Ga. at 175-76. Bouvier defined "marriage" as a "contract made in due form of law, by which a free man (i.e. not a slave) and a free woman reciprocally engage to live with each other during their joint lives in the union which ought to exist between husband and wife." *Bouvier's Law Dictionary*, (6th ed. 1856). Indeed, in *State v. Fry*, 4 Mo. 120, 151 (1835), the Defendant in Error argued a valid marriage required that, "[t]here must be a man and a woman. Two men cannot make it. Two women cannot – only one man and one woman under our laws can enter into it. . . ." (emphasis added). Thus, same-sex marriage was unrecognized in antebellum America.

Following the Amendment's adoption, this Court also confirmed the traditional definition of marriage. In *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), the Court upheld the 1882 Act forbidding bigamy or polygamy in Utah Territory, stating that the legislation served an important purpose. Justice Matthews, writing for a unanimous Court, concluded that the legislation was established "on the basis of the idea of family, as consisting in and springing

from the union for life of one man and one woman in the holy estate of matrimony. . . ." *Id.* In *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878), this Court held, even against a Free Exercise challenge, that polygamy could be validly banned. Thus, in this Court's view, well after the Fourteenth Amendment had been adopted, the definition of marriage remained precisely the same – the union of one man and one woman.

II. The Original Meaning of The Fourteenth Amendment is Limited to Addressing Issues of Racial Discrimination and was Not Intended to Invalidate State Reserved Powers Regarding Domestic Relations.

A. *Analysis of the Equal Protection Clause in Light of Its' Original Meaning.*

Justice Black, analyzing the Fourteenth Amendment's history in *Oregon v. Mitchell,* 400 U.S. 112 (1970), noted the Amendment "was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. . . ." 400 U.S. at 127. He added, "the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Id.*

This was precisely the Fourteenth Amendment framers' viewpoint. Senator Lot Morrill, argued against the franchise for women by distinguishing race from sex. He noted that the denial of rights

"upon pretense of race or color, is to ignore the fundamental principles of republicanism. . . . ." *Cong. Globe*, 39th Cong., 2nd Sess. 40 (1866). For women, "suffrage disseverates her . . . from . . . duties of the family. . . ." *Id.* It would "contravene all our notions of the family; 'put asunder' husband and wife, and subvert the fundamental principles of family government." *Id.* Thus, "equality before the law . . . does not prevent the State from qualifying the rights of the citizen according to the public necessities." *Id.*

1. Deference to States' Reserved Powers Regarding Domestic Relations Under Equal Protection.

Justice Black's assessment in *Mitchell* is mirrored by cases regarding marriage and domestic relations, deferring to the State's legislative choices except for instances of racial discrimination. Early on, this Court observed:

> . . . it cannot, without causing the equality clause of the 14th Amendment to destroy the powers of the States on a subject of purely local character, be held that a classification which takes near relatives by marriage and places them in a class with lineal relatives is so arbitrary as to transcend the limits of governmental power.

Campbell v. California, 200 U.S. 87, 95 (1906). By contrast, the Court reversed a custody decision based upon racial criteria. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also, Loving v. Virginia*,

388 US. 1, 11 (1967) [applying strict scrutiny for racial discrimination]; *but see, Michael H. v. Gerald D.*, 491 U.S. 110, 126, n. 6 (1989) [using rational basis for State's "categorical preference" of husband over putative natural father in providing visitation rights]. Accordingly, the Sixth Circuit correctly used a minimal "rational basis" Equal Protection scrutiny.

Federalism and respect for the State's "absolute right to prescribe the marriage relation between its own citizens" dictate the applicable Equal Protection analysis. *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). Because of family concerns, the framers saw a clear distinction between racial discrimination and discrimination against married women in State marriage laws. *Cong. Globe*, 39th Cong. 1st Sess. 1293 (1866) (statement of Shellabarger); *Id.* at 1089 (statement of Bingham).

Great deference is given the State when its reserved powers are at stake. Notably, the Court has, "established the rule that scrutiny under the Equal Protection Clause will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (internal quotations omitted.) In *Gregory*, the Court was "dealing . . . with a State constitutional provision approved by the people of Missouri as a whole." *Id.* at 471. In such circumstances, the Court emphasized it, "'. . . will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate pur-

poses that we can only conclude that the [people's] actions were irrational.'" *Id.* Also, the Court, employing rational basis analysis, has held unequal treatment of aliens – normally requiring "close judicial scrutiny" – is constitutional, weighed against reserved Tenth Amendment powers. *Foley v. Connelie*, 431 U.S. 291, 296 (1978).

2. Deference to States' Reserved Powers Regarding Domestic Relations Extends to a State's Definition of Marriage.

That same rational basis test applies equally to a State's marriage definition. The regulation of marriage, particularly where a vote of the people is involved, is a matter "firmly resting within a State's constitutional prerogatives." *Gregory*, 501 U.S. at 469. As in *Gregory*, the "Fourteenth Amendment does not override all principles of federalism." *Id.*

Justice Powell's concurring opinion in *Zablocki v. Redhail*, 434 U.S. 374 (1978) is highly instructive. There, he appropriately concluded that a "'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce." *Id.* at 399. Decisions, such as *Sosna*, *Pennoyer*, and *Maynard v. Hill*, 125 U.S. 190 (1888), were cited to support his conclusion that "[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Id.* This was the precise view of the Amendment's framers.

Accordingly, like the framers, Justice Powell concluded the State, in regulating marriage may, without violating the Equal Protection Clause, impose "bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests." *Id.* (emphasis added). In his view, the rational basis test used in *Reed v. Reed,* 404 U.S. 71, 76 (1971), even for gender discrimination, was controlling. *See also, Craig v. Boren*, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring). Thus, in *Zablocki,* the constitutional defect was not the State's regulation of marriage, but its failure to "make provision for those without the means to comply with child-support obligations." 434 U.S. at 400.[4]

By contrast, absolute bans upon non-traditional forms of marriage, such as bigamous, incestuous or same-sex marriages, were constitutional so long as otherwise applied equally. Thus, Justice Powell believed that the state's defining marriage as traditionally defined does not offend the Fourteenth Amendment. Justice Powell's analysis, like the original meaning, should control here.

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[4] While gender discrimination might demand a higher standard in certain cases, *see, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996), not here. Where a reserved power is involved, rational basis review is required.

3. Because *Loving* is a Case Involving Race-Based Discrimination, its' Holding is Consistent with the Interplay Between The Fourteenth and Tenth Amendments.

Further, Justice Powell deemed *Loving* irrelevant. As he noted, "[a]lthough *Loving* speaks of the 'freedom to marry' as 'one of the vital personal rights essential to the orderly pursuit of happiness by free man,' the Court focused on the miscegenation statute before it." *Zablocki*, 434 U.S. at 398. Thus, denial of marriage "on a wholly unsupportable basis" – race – is constitutionally untenable. *Id.* By contrast, *Loving* "does not speak to the level of judicial scrutiny of, or governmental justification for 'supportable' restrictions on the 'fundamental freedom' of individuals to marry or divorce." *Id.* Justice Powell's concurring opinion correctly captures the balance between the Fourteenth and Tenth Amendments.

Additionally, the common law permitted interracial marriage between a man and woman, but did not recognize same-sex marriage. *Compare*, *Swartz v. State*, 7 Ohio C.D. 43, 46 (1896) [concluding common law marriage is "'a simple agreement between one man and one woman . . . that they will take one another as husband and wife. . . .'"] *with Andrews v. Page*, 50 Tenn. 653, 669 (1870), [finding race or color is not an impediment to marriage at common law]. As one scholar writes, state statutes forbidding interracial marriage ". . . were in derogation of the common law. . . ." Upham, *Interracial Marriage and*

the Original Understanding of the Privileges or Immunity Clause, 42 Hastings Const. L. Q., 213, 218 (2015). Professor Upham argues convincingly that "the Amendment was generally understood, during its framing and adoption, to preclude the making or enforcing of such laws." *Id.* at 243; *see also*, *Burns v. State,* 48 Ala. 195, 197 (1872).

This overarching framers' intent also is demonstrated in *Strauder v. West Virginia,* 100 U.S. 303, 310 (1879). There, this Court stated that the "aim [of the Amendment] was [to prohibit] . . . discrimination because of race or color. [I]ts design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Id.* Thus, *Loving* barred racial discrimination, certainly, but its *dicta* regarding the fundamental right to marriage does not suggest anything about same-sex marriage. *Loving* was correct because "the Fourteenth Amendment had constitutionalized the Civil Rights Act of 1866, which said that African Americans had the 'same' right to make contracts as was enjoyed by a white citizen." Calabresi, *Does The Fourteenth Amendment Guarantee Equal Justice For All?*, 34 Harv. J. L. & Pub. Pol'y, 149, 151 (2011).

Accordingly, rational basis scrutiny under Equal Protection should be applied to the States' definition of marriage, long the province of the States. Marriage is central to State domestic relations law. *Williams v. North Carolina,* 317 U.S. at 298. As Justice Frankfurter remarked, the Supreme Court is "not authorized nor are we qualified, to formulate a na-

tional code of domestic relations." *Id.* at 304 (Frankfurter, J., concurring). Because the State's powers here are reserved by the Tenth Amendment and are exercised through a popular vote codifying longstanding common law, *Gregory* dictates a minimum scrutiny analysis.

4. This Court's "Animus" Jurisprudence Does Not Extend to States' Definitions of Traditional Marriage.

Not involved here is unlawful discrimination against gays generally. *See Romer v. Evans*, 517 U.S. 620 (1986); *Lawrence v. Texas*, 539 U.S. 558, 581 (2003), (O'Connor, J., concurring). Instead, the question is the State's power to define marriage identical to the definition used at the time the Fourteenth Amendment was adopted and long afterwards – that marriage consists of the union between man and woman. Moreover, when the State so defines marriage as the framers of the Amendment defined it, the "animus" found in *Romer* may not be attributed, particularly when the Court itself has endorsed such a definition in both *Murphy* and *Baker*.

B. *Analysis of Due Process in Light of The Fourteenth Amendment's Original Meaning.*

This Court has long recognized that a "liberty" interest for Due Process purposes must be "so rooted in the traditions and conscience of our people to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) or "implicit in the concept of

ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As Justice Alito recently stated, "it is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition." *Windsor*, 133 S.Ct., at 2715 (Alito, J., dissenting).

1. The Framers' Understanding of Marriage at the Time of the Adoption of The Amendment's Due Process Clause Shows They did not Contemplate a Right to Same-Sex Marriage, but Instead Sought to Preserve Existing State Marriage Laws.

History bears out Justice Alito's observation. The Fourteenth Amendment framers went to considerable lengths to preserve the traditional family unit, even insisting upon the subordination of married women. With this in mind, they did not, by any stretch of the imagination, contemplate that same-sex marriage was required by the Amendment or its Due Process Clause. And, this Court's decisions, since the Amendment's adoption, reflect the paramount importance which the framers clearly gave domestic relations, ensuring that states must make the important decisions regarding marriage and family life, with minimal judicial interference. If states wish to authorize same-sex marriage, they certainly may, but the Fourteenth Amendment does not mandate they do so.

The reasons justifying traditional marriage were clear to the framers. Only that form of marriage was

thought valid, both before and after the Amendment's adoption. As Chancellor Kent noted, "[t]he primary and most important of the domestic relations is that of husband and wife." Chancellor James Kent, *Commentaries on American Law*, Vol. 1, Lecture 26 of the Law Concerning Marriage (New York, O. Holsted 1826). Marriage "has its foundation in nature and is the only lawful relation by which Providence has permitted the continuance of the human race. It is one of the chief foundations of social order." *Id.* The Pennsylvania Supreme Court also explained the "paramount purposes of the marriage [are] – the procreation and protection of legitimate children, the institution of families and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world." *Matchin v. Matchin*, 6 Pa. 332, 337 (1847).

The common law recognized only marriage between man and woman for these same important reasons. It was said in *Honey v. Clark*, 37 Tex. 686, 703 (1872), shortly after the Amendment's adoption, that the definition of marriage at common law is "a compact between a man and a woman, for the procreation and education of children; children being the chief end of marriage."

Moreover, marriage is a contract "by two persons of different sexes with a view to their mutual comfort and support and for the procreation of children." Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce*, Vol. 2, § 31, (Boston, Little Brown and Co. 1852). Following ratification of the

Fourteenth Amendment, Bishop also explained same-sex marriage did not meet the definition of "marriage" because "marriage between two persons of one sex" would not "perpetuate population or produce the comforts and solace resulting from the family relationship." Bishop, *Commentaries on the Law of Marriage and Divorce*, Vol. 1, § 321 (Boston, Little Brown and Co., 5th ed. 1873). In his words, same-sex marriage has "no validity." *Id.*

From these authorities it is clear why same-sex marriage was rejected as an alternative to traditional marriage at the time of the Fourteenth Amendment's adoption. It was not because of animus against homosexuals. Instead, marriage between man and woman served to procreate children and was the foundation of family life.

2. Decisions of This Court Regarding The Right to Marriage Also Show a Focus on Protecting States' Traditional Notions of Family, Rather Than Attempting to Redefine Family.

Subsequent decisions reinforce that there is no fundamental "liberty" interest in same-sex marriage. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court enumerated various interests for substantive protection by the Due Process Clause. Included was the right to "marry," as well as "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. As noted, the common law recognized no right whatever to marry between members

of the same sex, but only between opposite sex partners. Thus, neither in *Meyer* in 1923, (or *Loving* in 1967) was the concept of same-sex marriage considered a right to "marry," protected by substantive Due Process. *See also, Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ["Marriage and procreation are fundamental to the very survival of the human race."].

Michael H. v. Gerald D. is instructive in rejecting any Due Process claim here. In a plurality opinion, the alleged natural father possessed no fundamental "liberty" interest to overcome an irrebuttable presumption that a child of a married woman living with her husband is a child of the marriage. 491 U.S. at 124. A constitutionally protected "liberty interest" must not merely be denominated "fundamental," but must also be "an interest traditionally protected by our society." *Id.* at 122. The plurality quoted *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) that "'[t]he family is deeply rooted in this Nation's history and tradition.'" *Id.* at 124. Since there is not "a single case old or new" awarding "substantive parental rights" to the natural father over the husband of the marriage, "[t]his is not the stuff of which fundamental rights qualifying as liberty interests are made." *Id.* at 127; *see also, Lehr v. Robertson,* 463 U.S. 248, 256-257 (1983); *see also, McDonald v. City of Chicago,* 561 U.S. 742, 778 (2010).

So here too. Judicial self-restraint is achieved in the substantive "due process area" only by "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie

our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Griswold v. Connecticut*, 381 U.S. 479, 501-02 (1965) (Harlan, J., concurring).

3. Deference to, and Protection of, States' Traditional definition of Marriage is Consistent with The Interplay of The Tenth and Fourteenth Amendments.

Applying Justice Harlan's criteria, federalism and the Tenth Amendment reinforces the states' virtual plenary power to define marriage. The "teachings of history" demonstrate marriage between one man and one woman has been the only form of marriage recognized prior to, at the time of, and long after the Fourteenth Amendment was adopted. Finally, the "basic values that underlie our society" have always supported traditional marriage in order to procreate and raise children as part of the family. *Washington v. Glucksburg*, 521 U.S. 702, 766 (1997) (Souter, J., concurring). Thus, substantive Due Process is not violated by a state's defining marriage as consisting only between one man and one woman. Such a requirement is rationally related to a legitimate state interest. *Id.; see Baker v. Nelson*, 409 U.S. at 810 (summarily affirming Supreme Court of Minnesota's application of rational basis review).

Judge Niemeyer put it well in *Bostic v. Schaeffer*, 760 F.3d 352, 391 (Niemeyer, J., dissenting) noting, that ". . . when the Supreme Court has recognized, through the years, that the right to marry is a fun-

damental right, it has emphasized the procreative and social ordering aspects of traditional marriage." Virtually a century after the Fourteenth Amendment's ratification, Justice Harlan summarized, consistent with the views of the Amendment's framers, the essential purpose of marriage writing, "lawful marriage form[s] a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis." *Poe v. Ullman,* 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

Thus, as to the question presented, whether "the Fourteenth Amendment require[s] a State to license the marriage between two people of the same sex," the answer is a resounding no. The Amendment's framers could not imagine such a conclusion. They insisted upon, and this Court's decisions have strongly supported, a Fourteenth Amendment which leaves marriage laws entirely to the states. As Representative Hale stated during the Amendment's debates, "[any] reforms of [state marriage laws] should come from the States, and not be forced upon them by the centralized power of the Federal Government." *Cong. Globe,* 39th Cong., 1st Sess. 1064 (1866). While this Court's decisions have not always hewed to history in defining the Amendment's reach, the Court should do so now. The family unit between man and woman was of such paramount importance to the framers they could not have imagined the Amendment they enacted, and the one the people ratified, could require same-sex marriage.

CONCLUSION

The framers of the Fourteenth Amendment understood well that laws governing marriage were the province of the states, which remained free to adopt their own views as they saw fit. While to some, their views might now appear outdated, they were in tune with the democratic process and federalism. Under the Tenth Amendment, each state could impose disabilities upon married women, or remove those disabilities altogether. Under the Tenth Amendment, each state may elect to adopt the traditional view of marriage, or expand marriage to include same-sex couples. But the framers wished to ensure that the people of a state were not, by adoption of the Fourteenth Amendment, required to do one or the other.

Respectfully Submitted,

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